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No. 84-720

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

GEORGE DEUKMEJIAN, Governor of the State of California, *et al.*,
Appellants,

VS.

NATIONAL MEAT ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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I

THE DISCRIMINATION ISSUE RAISES SUBSTANTIAL FEDERAL QUESTIONS

A. The Armco and Bacchus Decisions

The appellees argue that this Court's decisions in *Armco, Inc. v. Hardesty,* ..... U.S. ....., 81 L.Ed.2d 540 (1984), and *Bacchus Imports, Inc. v. Dias,* ..... U.S. ....., 82 L.Ed.2d 200 (1984), are "beacons that clearly light the way" here. Appellees' Motion to Dismiss or Affirm 4 ("M.D.A."). Neither case provides significant illumination here. Turning first to *Armco,* California here is attempting to regulate and promote an industry product, not, as West Virginia was attempting in *Armco,* to obtain general governmental revenues from all persons located within its jurisdiction. As part of its regulatory and promotional program, California distributes the program costs among the industry that receives the benefits, to the extent that such distribution of costs is feasible. Actual marketing conditions make it infeasible for California to impose identical assessments against the instate and out-of-state components of the industry. J.S. 2-3, 20.

Thus, unlike West Virginia in *Armco,* California in pursuing legitimate regulatory and promotional goals here by the only reasonable means available. For this reason, California should be afforded some latitude in distributing the program costs among the regulated industry. California should not be held to the less tolerant, more objective standard applied in *Armco,* where West Virginia was unable to demonstrate a legitimate interest in placing different taxes against instate and out-of-state wholesalers.

Bacchus is distinguishable because Hawaii, in that case, attempted to expand its *local* industry by exempting it from a tax placed on the out-of-state liquor industry. 82 L.Ed.2d at 205, 207-210. This Court held that Hawaii's interest in expanding its local industry was not sufficient

to justify placing a greater tax on the out-of-state industry. *Id.* Here, California provides the benefits of its marketing program to *all* who market beef in California—including the out-of-state industry—and does not encourage only the development of its local industry. Indeed, since the local industry pays a disproportionately heavier share of the marketing program costs than the out-of-state industry, see J.S. 3, the out-of-state industry actually receives a *greater* benefit per cost than the local industry. The appellees' statement that California "seeks simply to assist its local industry," M.D.A. 14, to the extent that the statement implies that California does not similarly assist the out-of-state industry, contradicts the appellees' concession that they also "benefit" from the California program. J.S. 4; Stip. 10.[1]

The appellees, following the Ninth Circuit's *per se* analysis, disregard the extrinsic economic factors that justify the California assessment scheme, and that distinguish this case from *Armco* and *Bacchus*. The appellees wholly ignore the fact that—since the California industry pays multiple fees for the same product and the out-of-state industry does not—the appellees actually receive a subsidy at the expense of the California industry. J.S. 2-3, 20. Further, the appellees dismiss the fact that out-of-state processors pass back the assessments to out-of-state

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[1]The appellees also argue that *Bacchus* rejected the argument that a state can "discriminate" against an economically powerful industry that can "shift the burden" to another industry. M.D.A. 12. In fact, *Bacchus* did not hold this at all. In the passage cited by the appellees, *Bacchus* held only that a state cannot discriminate against a "thriving" industry in favor of a "struggling" one. 82 L.Ed.2d at 210. Since California provides the benefits of its marketing program *equally* to the instate and out-of-state industries, and since the out-of-state assessments are not ultimately borne by out-of-state processors, California is not discriminating against a thriving industry in favor of a struggling one.

producers, even though they offered no evidence challenging California's evidence that such a pass back occurs. J.S. App. 10; Youde Dec. 2-8. Instead, the appellees now argue, as the Ninth Circuit held, that this economic factor is irrelevant because the constitutional issue would otherwise "fluctuate as a function of market conditions." M.D.A. 8; J.S. App. 11. In fact, marketing conditions and other extrinsic factors can potentially change in *any* case involving alleged discrimination under the Commerce Clause. Nonetheless, this Court has consistently held that the discrimination issue turns on the "practical operation" of the state law, see, *e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980); J.S. 13-14, which indicates that the practical effect of the state law in the market place is relevant even thought marketing conditions may change. In any event, the disparity of market power between processors and producers in the beef cattle industry, which provides the basis of the pass back, is a long-standing historical phenomenon that is unlikely to change in the foreseeable future.[2]

The appellees, attempting to apply *Armco* here, argue that sales of live cattle and processed beef are not "substantially equivalent events" for assessment purposes, because the cattle and beef industries are "quite distinct." M.D.A. 6. The argument is irrelevant because the cattle and beef industries equally benefit from the California

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[2]The appellees assert that this Court rejected a pass back argument in *Bacchus*. M.D.A. 13. In fact, the argument in *Bacchus* was that the tax would be passed *on* to consumers, not back to suppliers. 82 L.Ed.2d at 213. In any event, the Court rejected the argument only as it was asserted in opposition to the out-of-state industry's standing to constitutionally object to the Hawaiian taxing scheme. *Id.* Nothing in *Bacchus* suggests that shifting of a tax or assessment in actual economic reality is irrelevant in determining the constitutionality of the tax or assessment, as opposed to the question whether the plaintiff has standing to challenge it.

marketing program, and because the assessments are ultimately borne by similarly situated competitors under actual market conditions. J.S. 2-3, 19. Further, contrary to the appellees' premise, the cattle and beef industries are not distinct at all. In economic reality, they comprise a homogenous, vertically interdependent industry engaged in the production of a single product, beef. Beef is simply cattle in processed form, and cattle is the raw material of beef. In any event, since cattle and beef sellers equally benefit from the California marketing program, and since the assessments are ultimately borne by similarly situated competitors, it is immaterial whether the sales of cattle and beef are "substantially equivalent events."

B. Alternatives

The appellees endorse the Ninth Circuit suggestion that, as an alternative, California can assess instate and out-of-state processors "equally." M.D.A. 14 n. 8; J.S. App. 15. As explained in the Jurisdictional Statement, actual marketing conditions make it infeasible for California to assess the instate and out-of-state industries "equally." J.S. 20-21. Such an alternative would place the entire marketing burden on a single group of competitors, rather than distribute the burden across the entire industry; and would require the assessed competitors to pay more than the equivalent of a single head fee, contrary to the legislative purposes underlying the marketing program. *Id.* The appellees do not deny that these economic consequences would flow from the Ninth Circuit alternative. Nor do they defend this alternative on grounds of either feasibility or fairness. Although we agree with the appellees that this Court "should [not] fully review every Commerce Clause case involving alleged discrimination," M.D.A. 5, this Court should review cases where, as here, lower courts—improperly applying a mechanical *per se*

test rather than a balancing one—supplant carefully-drawn legislative judgments with judicial judgments not fully understood.

C. Fair Apportionment

The appellees argue, for the first time in this litigation, that the California assessment scheme is not fairly apportioned because it may result in "double taxation" in cases where out-of-state processors pay assessments to their own states. M.D.A. 9-11. In fact, California levies an assessment only for the benefits provided by its *own* marketing program, and the assessment is *directly* tied to the benefit provided by the California program. J.S. 18-19. Axiomatically, no other state can levy an assessment for the benefits provided by the California program. If other states levy assessments, the assessments will compensate for benefits provided by the other states. Since the California assessments are levied solely for the benefits provided by the California program, and are tied directly to such benefits, there is no danger of "double taxation" or unfair apportionment. The appellees' newly-fashioned argument is without merit.

II

THE "NEXUS" ISSUE RAISES SUBSTANTIAL FEDERAL QUESTIONS

The appellees' analysis of the "nexus" issue reflects the extent to which they, as well as the Ninth Circuit below, view this case as governed by principles established in conventional tax cases. According to the appellees, the "nexus" requirement in tax cases—which provides that a taxpayer must have a physical presence in the taxing state—mechanically applies in cases where a state imposes assessments to compensate for specific benefits provided to interstate commerce. M.D.A. 17-19 To the contrary, the conferring of the benefit authorizes the state to seek compensation regardless of whether the assessee has a

physical presence in the state. Otherwise, the beneficiary would receive the benefits of the state program without paying a fair share of its costs. Hence, the conventional "nexus" requirement does not apply where, as here, the state seeks compensation for specific benefits provided.

The appellees argue that the benefits-conferred argument was rejected in *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1957), where this Court held that Illinois could not levy use taxes against out-of-state mail order houses that shipped merchandise to Illinois consumers. M.D.A. 18-19. In that case, Illinois provided no specific benefits to the out-of-state mail order houses for which Illinois could legitimately seek compensation. The case is thus not relevant here.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for plenary consideration.

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Respectfully submitted,

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